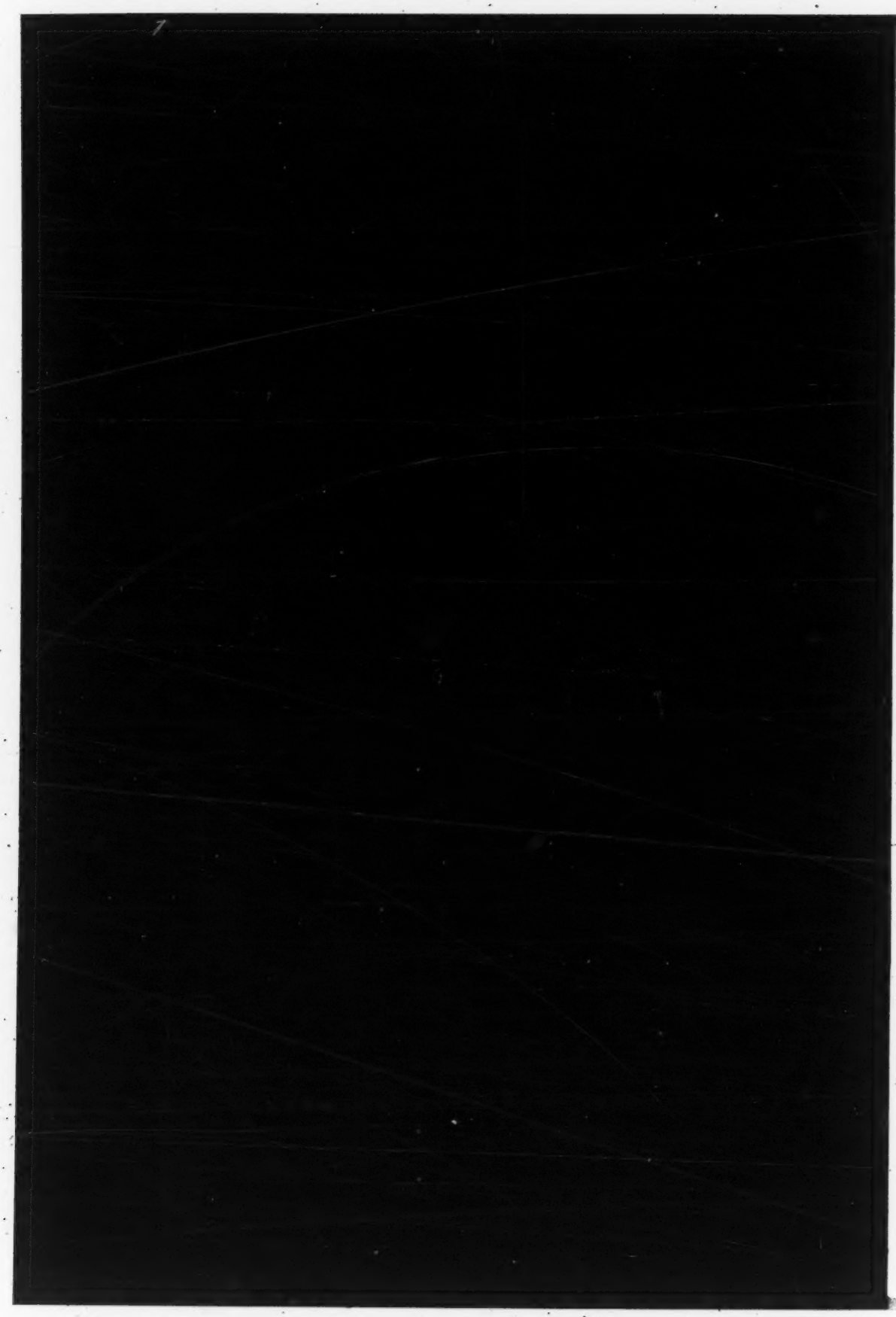

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1128.

CONSOLIDATED COPPERSTATE LINES, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 1141

STRICKLAND TRANSPORTATION COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals from the judgment of a three-judge district court (J.S. App. A; 293 F. Supp.

858)[1] which dismissed complaints seeking to set aside certain orders of the Interstate Commerce Commission (J.S. App. B, D).[2] The Commission denied appellants' separate applications under section 5 of the Interstate Commerce Act (49 U.S.C. 5) for permission to purchase certain operating rights of the England Transportation Companies (England), as well as their related applications under section 207 of the Act (49 U.S.C. 307).

Appellant Consolidated Copperstate Lines (Copperstate) is a carrier in western and southwestern states, with its present eastern terminus at Houston, Texas. It sought England's authority to operate eastbound from Houston to New Orleans and westbound from New Orleans to Lake Charles, Louisiana. Additionally, Copperstate filed an application under Section 207 for authority duplicating England's authority and also for authority to operate from Lake Charles to Houston (which England did not have). By these applications Copperstate would extend its routes eastward to New Orleans.

Appellant Strickland Transportation Co., Inc. (Strickland), has authority to serve New Orleans from north central and northeastern points, but is required to do so circuitously, via points in Texas. It sought England's authority to operate between Louisiana points, including Shreveport, Monroe and New Orleans. Since Strickland has authority to serve Shreve-

[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed in No. 1128.

[2] A stay of judgment was granted on February 4, 1969, by Mr. Justice Harlan, conditioned upon the filing of jurisdictional statements by March 10, 1969.

port and Monroe directly from the north, the purchase would complete a relatively direct route to New Orleans, eliminating the need to detour through Texas.

The various applications, opposed by many competing motor carriers, were consolidated for all purposes. After lengthy hearings,[3] the examiner recommended conditional grants, but the Commission denied the applications upon consideration of exceptions and replies. The grounds of the Commission's denial were accurately summarized by the lower court (J.S. App. A, 3):

> * * * the Commission, upon substantial evidence, found (1) that both Copperstate and Strickland were relying on past operations unlawfully performed by the England Companies in violation of the terms of their certificates, (2) that to the extent such past operations had been unlawfully performed, they would not be considered as probative of the public interest, (3) that both Copperstate and Strickland, as well as the England Companies, had performed so-called cross-hauling in violation of their certificates, (4) that Strickland had unlawfully managed and controlled certain rights of England (La.) prior to the Commission's approval of the temporary lease arrangement, (5) that both purchase proposals were so different from that service lawfully rendered as to constitute a new service for which the public convenience and necessity must be proved, (6) that neither carrier had borne its burden of proof in showing a need for the new services, and (7) that

[3] The hearings involved over 4,000 pages of transcript and over 200 exhibits.

neither Strickland nor Copperstate was entitled to any special consideration under the doctrine of color-of-right or because of an overriding public interest.

Petitions for reconsideration and to reopen the proceedings for the receipt of additional evidence were subsequently denied by the Commission (J.S. App. D).

On review, the district court sustained the Commission's orders, holding that they were based on adequate findings of fact and supported by substantial evidence (J.S. App. A).

ARGUMENT

These cases involve the application of familiar rules to particular fact situations. A motor common carrier seeking to purchase the franchise of another has long been required to show, under Section 5 of the Act (49 U.S.C. 5), that the franchise is not dormant and that no materially new service will result from the acquisition. If revived or new operations are contemplated, the purchaser must prove that the public convenience and necessity require them. These principles are well settled.[4] Their application to the particular facts of these cases was unanimously approved by the court below and raises no substantial question.

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[4] *E.g.*, *Braswell Motor Freight Lines, Inc.* v. *United States*, 275 F. Supp. 98 (W.D. Tex.), aff'd *per curiam*, 389 U.S. 569; *Great Coastal Express, Inc.* v. *United States*, 243 F. Supp. 943 (E.D. Va.), aff'd *per curiam*, 382 U.S. 369; *Shein* v. *United States*, 102 F. Supp. 320 (D.N.J.), affirmed *per curiam*, 343 U.S. 944; *C & H Transp. Co.* v. *United States*, 249 F. Supp. 97 (N.D. Tex.); *Houff Transfer, Inc.* v. *United States*, 291 F. Supp. 831 (W.D. Va.).

A. STRICKLAND'S APPEAL (NO. 1141)

The applications involved in this case represent the most recent of Strickland's continuing efforts to procure direct access to New Orleans from the north. These efforts began with a proposed purchase of England in 1958, which the Commission refused to approve, 85 M.C.C. 549, because it "would create a new competitive service * * * for which no need had been shown" (J.S. App. 10). Strickland then sought the same end by an arrangement with a railroad for "piggyback" shipment of its trailers into New Orleans by flatcar; this contract was found unlawful. *Gordon's Transports, Inc.* v. *Strickland Transportation,* 318 I.C.C. 395 (1962), sustained *sub nom. Strickland Transportation Co.* v. *United States,* 219 F. Supp. 618 (N.D. Tex.).[5] The next step was an "interchange" agreement between Strickland and England, which was in effect until the Commission approved a temporary lease arrangement pending its decision in the instant proceeding. Finally, by its applications in this proceeding, Strickland sought access from the north via two Louisiana cities England had served: (1) Shreveport, where the purported interchange had operated, and (2) Monroe, where England offered delivery service to and from New Orleans.

1. *Shreveport-New Orleans*—Strickland contends that the Commission improperly treated England's Shreveport-New Orleans rights as constructively dor-

[5] Neither the Commission nor the lower court passed on the *present* validity of any Strickland operations conducted via rail "piggyback." In any event "piggyback" rules are not decisive as to the all-motor operations now in question.

mant, thus requiring Strickland to demonstrate public need. The basis for the Commission's treatment was that England had exercised these rights almost exclusively for the "interchange" arrangement with Strickland, which it found to have been, in effect, an unlawful assumption of the rights by Strickland (J.S. App. 32–35).

The purported interchange had operated as follows: At both Shreveport (where Strickland's trucks would otherwise have had to detour through Texas) and New Orleans, shipments which began and ended on Strickland waybills would be brought to England for transportation to the other city. At the other city, England would return the shipments to Strickland for further shipment or delivery, even in England's own delivery area of New Orleans (J.S. App. 32). Since the shipments were delivered to and then retrieved from England in loaded and sealed trailers (J.S. App. 17), the service England provided was in no respect different from that which Strickland had previously sought to arrange unlawfully with the railroad; it simply bridged the gap in Strickland's authority, which the Commission had previously found "no need" to bridge. Indeed, all damage claims were paid by Strickland, contrary to the general practice as to "concealed damage" followed by carriers participating in bona fide "through movements" (Tr. 131, 167); England received only a flat fee per trailer hauled, regardless of weight or the nature of the goods carried, and in violation of the Commission's regulations requiring segregation of equipment and freight charges in interchange cases (49 C.F.R. 1057.5(c); J.S. App. 33–44). Virtually all the trailers thus moved belonged

to Strickland—59 of 60 in a sampled week (Tr. 185, 520); and during a period when Strickland moved over thirteen thousand tons through the so-called interchange, England moved only thirty-nine tons of its own freight, little more than two truck loads (Ex. 12–23) and 0.3 percent of the total haulage.

The Commission concluded that the service amounted to "operations by Strickland without possession of a certificate" (J.S. App. 34). The conclusion that the interchange was thus not valid, and that therefore England's rights were constructively dormant, is basically factual, adequately supported by the record as outlined above. The agency's construction of its own regulation involves no substantial question (*Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414), especially since it involves mechanics and financing of trailer "interchange" arrangements, a subject within the Commission's informed discretion.

Even assuming that the arrangement might have complied with the technicalities of the Commission's "interchange" rules, this would hardly establish its legality as a device whereby Strickland could evade the limitations on its own certificates by acquiring another carrier's rights. Ostensible compliance with technical requirements does not preclude a finding of illegality. *Knetsch* v. *United States*, 364 U.S. 361. Thus, the Commission has consistently held, as here, that technical compliance with "lease and interchange" rules cannot be used as a device to create non-existent operating authority. *Tank Lines, Inc.—Purchase*, 90 M.C.C. 381, 384 (1962), sustained *sub nom. Tank Lines, Inc.* v. *United States*, 236 F. Supp. 354 (E.D. Va.

1964); *Stewart—Investigation of Control,* 87 M.C.C. 681, 696; *Campbell Sixty-Six Exp., Inc.,* 81 M.C.C. 53, 56; *Dealers Transit, Inc.—Control and Merger,* 93 M.C.C. 611, 619.[6]

2. *Monroe-New Orleans.*—Strickland also sought access to New Orleans via Monroe, Louisiana, which would have made possible routes from the north even shorter than those via Shreveport. In this regard, it sought to purchase the rights England had used to operate between Monroe and New Orleans. But, as the Commission found, England had used this authority on a strictly local basis between the two cities and intermediate points, as "strictly a distribution service" or a "simple peddle service" (J.S. App. 36–37). Strickland, on the other hand, contemplated the New Orleans-Monroe route as a leg of direct, single-line service between Chicago and New Orleans (J.S. App. 36). Thus, the Commission found, Strickland meant to put England's authority to a "vastly different" use—the same use for which the Commission had found there was "no need" (J.S. App. 37). Strickland's argument that the Commission never focused on its

[6] The Commission properly ruled that Strickland's belated submission of the agreement underlying the "interchange" did not require further hearings or reconsideration (J.S. App. 238–240). With or without a written document, the Commission's analysis of the underlying arrangement revealed it to be a subterfuge whereby Strickland acquired England's rights, using them as its own. Moreover the agreement should have been introduced during the hearings, where the legality of the "interchange" was at issue from the outset. Finally the agreement on its face violates the applicable regulation, 49 C.F.R. 1057.5(a) which requires that the document specifically describe vehicles, points of interchange, and the consideration—all absent here. (Strickland J.S. 53a–56a).

application, as distinguished from the examiner's recommendations (J.S., No. 1141, 35–36), is not well taken. The basic proposal was clearly considered and rejected when the Commission ruled that "[a]s we found in the *prior Strickland-England* case, the acquisition of England's irregular route rights by Strickland and conversion to a link in its long-line regular routes would be of little public benefit and would be certain to harm the operations of existing carriers." (J.S. App. 37).

B. COPPERSTATE'S APPEAL (NO. 1128)

Copperstate, simultaneously with its purchase application, filed an application for permission to extend its routes under Section 207 of the Act (49 U.S.C. 307), thus duplicating the authority it sought to buy from England and adding Lake Charles-to-Houston authority which England had lacked. The purchase was rejected because it envisioned a new pattern of transportation which could not be approved absent a showing of need (J.S. App. 43), but this ruling is not in issue on this appeal. The concomitant Section 207 application was also denied for failure of the carrier to prove need (J.S. App. 48). The gist of Copperstate's appeal is an allegation that the Commission failed to consider adequately the question of need in connection with the purchase application. (J.S. 7, 10–12).

Having determined the question of need in the Section 207 case, the Commission was plainly not obligated to repeat the same analysis in the context of

the purchase case. The witnesses' evidence,[7] transportation contemplated, and standard of "need" were the same in both cases. The agency was not required to cover the same ground twice. See *Interstate Investors, Inc.* v. *United States,* 287 F. Supp. 374, 390 (S.D. N.Y.), aff'd *per curiam,* 393 U.S. 479. As the lower court stated:

> * * * Form does not govern substance and the Commission's findings in the § 207 proceedings are fully applicable to the same issues in the § 5 matters. A study of the Commission's report requires the conclusion that its discretion rationally segregates and disposes of all issues raised in each proceeding. [J.S. App. 5].

There is no inconsistency between this case and *Consolidated Freightways Corp. of Delawdre—Control,* 104 M.C.C. 194, which held that whether a new service would be created through purchase should be determined on the facts of each case (104 M.C.C. at 217). Additionally, whether evidence of prior unlawful activity should be accorded more or less weight in a particular case is for the Commission to determine on the facts and poses no question for further review.[8]

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[7] There is no merit to the claim that the Commission analyzed only 90 Copperstate witnesses (J.S. 7, 11). Though the agency mentioned 90 witnesses (J.S. App. 44), the immediately following discussion of groups of 15, 56, 7, 12 and 51 witnesses (J.S. App. 45–47) shows that all the evidence was considered. Similarly, operations under temporary authority, allegedly ignored in the 207 case (J.S. 11), were in fact considered, albeit adversely to Copperstate (J.S. App. 47, 48).

[8] *Consolidated* involved illegal activities of predecessors which did not benefit the purchaser (104 M.C.C. at 208, 210). Here substantial illegality was attributable to Copperstate itself, whose conduct was described by the Commission as evincing "* * * willful and defiant disregard for regulation * * *." (J. S. App. 42).

In any event an agency's alleged inconsistency is not in itself adequate reason for plenary consideration by this Court. *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 665–666.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APRIL 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969